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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 711

LILLIAN LYNN,

Petitioner,

vs.

JAY J. LYNN,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of certiorari to review the final judgment of the Court of Appeals of the State of New York, made the 8th day of March 1951.

Opinions Below

The opinion at Special Term (R. 118-128) is reported in 192 Misc. 720. The prevailing and dissenting opinions at the Appellate Division (R. 139-158) are reported in 275 App. Div. 269. The opinion of the Court of Appeals (R. 161-168) is reported in 302 N. Y. 193.

Jurisdiction

The remittitur of the Court of Appeals is dated March 8, 1951 (R. 170) and this petition is presented within ninety

days from the date thereof. Jurisdiction is invoked under 28 U. S. C. § 1257(3).

Questions Presented

1. Are the State Courts of New York "compelled by the command of the full faith and credit clause" (R. 168) to restrict the doctrine of "divisible divorce" so as to render it inapplicable to every foreign divorce decree based on personal jurisdiction over both spouses?

2. Are the New York courts precluded from constitutionally establishing as matter of *state* law, that a husband can be held to the obligations imposed by a New York separate maintenance decree if it be conceded that the husband's subsequent Nevada divorce decree, although valid and based upon personal jurisdiction over both spouses, contained no inconsistent maintenance provisions and *expressly refrained from treating with the issue of support?*

3. The Nevada decree denied full faith and credit to the wife's New York separate maintenance decree by granting the husband a divorce on the ground of extreme cruelty, an issue resolved in the wife's favor by her New York judgment. In that situation, were the New York courts compelled by the full faith and credit clause to terminate the continued support and maintenance afforded to the wife by her New York decree?

4. Did the husband's federal tax deductions of the alimony payments made under the wife's New York separate maintenance decree during the years following the husband's Nevada divorce and the imposition by him of the consequent federal tax burdens upon the wife estop him from challenging the validity of the wife's New York judgment?

Statement

The parties were married in New York City in 1926. On January 22, 1942 a decree of separate maintenance was

granted to the wife in New York "upon findings that the defendant [husband] had wilfully abandoned her without cause or justification" (R. 161, 36, 37). The wife was awarded custody of the parties' only child, a girl then 14 years of age, and granted separate maintenance of $85.00 a week subject to modification upon a showing of change of circumstances (R. 42, 47).

In April 1943 the husband filed suit for divorce in Nevada claiming extreme cruelty "during the married life of the parties" (R. 27-29), both prior and subsequent to the rendition of the wife's decree. In a further pleading the husband averred that the acts of alleged cruelty "occurring since the 22nd day of January, 1942 [the date of the wife's New York judgment] are a continuance of a series of acts of extreme cruelty inflicted prior to that date and are directly associated with them" (R. 64-65). Thus but a single cause of action predicated upon extreme cruelty was the basis of the husband's Nevada divorce suit. The wife appeared in the Nevada action challenging the right of the Nevada Court to grant a divorce on the ground of alleged cruelty, and pleaded her New York decree as *res judicata* on that issue (R. 48).

No issue of support was tendered by any of the pleadings (R. 27-48) and it will be undisputed that counsel for both spouses so advised the Nevada Court. The husband was granted a divorce upon the ground of extreme cruelty "occurring after January 22, 1942" (R. 53),—that is after the marital relationship of the parties (albeit not the marital status) was terminated "forever" by the wife's New York decree (R. 42). The Nevada Court in rendering its decision and judgment struck out from the husband's proposed findings and decree provisions to the effect that the wife be denied alimony or support for herself and the child (R. 15, 16, 53).

Shortly after the granting of the Nevada divorce, the husband returned to New York City and promptly married another woman (R. 14), but as the New York Court of Appeals points out "he nevertheless continued to pay plaintiff [wife] the $85 a week *called for by the earlier New York judgment and for such amounts took the benefits of tax deductions in connection with his federal and state income taxes*" (R. 161-162; emphasis supplied). The wife thereby became subject to consequent tax burdens (R. 13).

In June of 1948 the wife, for compelling reasons (R. 8), applied for an increase in the alimony payments (R. 4, 5). The husband opposed on the ground that the Nevada decree deprived the wife of the right to any alimony. The Court at Special Term so ruled (R. 118-129). The Appellate Division by a divided court reversed, holding (1) that by expressly refraining from passing on the matter of the husband's obligation of support, the Nevada Court left in full force and effect the alimony provisions of the New York judgment—thus applying the doctrine of divisible divorce; (2) that the New York courts were not required to give full faith and credit to the Nevada decree because the Nevada Court had failed to give full faith and credit to the New York judgment; and (3) that the husband was estopped from pleading the Nevada decree as *res judicata* on the issue of alimony (R. 139-153, 162).

The Court of Appeals reversed, holding (1) that the divisible divorce doctrine (*Estin* v. *Estin*, 296 N. Y. 308, aff'd. 334 U. S. 541; *Kreiger* v. *Kreiger*, 297 N. Y. 530, aff'd. 334 U. S. 555) is not applicable to a divorce decree based upon personal jurisdiction of both spouses, and that such result even though it "may seem to some inequitable" (R. 167) was "compelled by the command of the full faith and credit clause" (R. 168); (2) that even accepting "the view of the Appellate Division that the Nevada Court, in decree-

ing the divorce, failed to give appropriate effect to the adjudication made in the New York action, the courts of this state [New York] would still be required to accord full faith and credit to the Nevada decree" (R. 163); and (3) that the wife "was not concluded by the defendant's [husband] characterization of the payments in his tax returns" and hence there was no basis for estoppel (R. 167).

Reasons for Granting the Writ

The case presents important constitutional and federal questions expressly reserved for adjudication by this Court (*Coe* v. *Coe,* 334 U. S. 378, 383, footnote 13; *Estin* v. *Estin,* 334 U. S. 541, 549). The New York Court of Appeals, we submit, misconstrued the decisions of this Court as to a state's power and prerogative to make the "divisible divorce" doctrine applicable to a foreign divorce decree, based on personal jurisdiction over both spouses, where the decree contained no support provisions incongruous with a local maintenance decree (*Coe* v. *Coe, supra,* p. 383).

The divergent opinions of the New York State courts in this case reflect the existing conflict as to the "divisible divorce" doctrine, particularly with respect to the extent to which it may be applied within the framework of the full faith and credit clause. Such conflict has arisen as to matters not previously presented to, and which were expressly reserved for decision by this Court and can only be resolved here.

Respectfully submitted,

SAMUEL GOTTLIEB,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

The New York courts are not compelled by constitutional command to deny the application of the "divisible divorce" doctrine to every foreign divorce decree based on personal jurisdiction of both spouses.

The opinion at Special Term repudiated the "divisible divorce" doctrine altogether, asserting that the New York Court of Appeals in *Estin* v. *Estin,* 296 N. Y. 308, affd. 334 U. S. 541, did not establish "a new rule on a question of local law" (R. 123, 124), i. e. the "divisible divorce" doctrine, nor "in reality intend to change the elementary doctrine that termination of the marital status terminated the support obligation" (R. 126).

The prevailing opinion at the Appellate Division disagreed (R. 146-147). That Court quoting from the opinion of the *Estin* case "that a support order can survive divorce" asserted that "New York has the power to make such a ruling despite the Nevada decree" (R. 146), and recognized that the *Estin* case did involve the adoption of a new principle of local law which, as the opinion itself described, "has come to be known as a 'divisible divorce' " (R. 147).

The Court of Appeals likewise disagreed with the opinion at Special Term, citing the *Estin* case for the proposition that "the 'divisible divorce', anomalous though it may at first appear, has become a recognized concept; it is now familiar law that a divorce decree may be completely effective to dissolve a marriage and yet completely ineffectual to alter certain legal and economic incidents of that marriage" (R. 162-163).

The Court of Appeals differed from the Appellate Division in applying the "divisible divorce" doctrine here, because as the opinion noted such "conclusion is here com-

pelled by the command of the full faith and credit clause, for, as the Supreme Court has recently declared (*Sherrer* v. *Sherrer, supra,* 334 U. S. 343, 355), 'if in its application local policy must at times be required to give way, such "is part of the price of our federal system. *Williams* v. *North Carolina,* 317 U. S. 287, 302" ' " (R. 168).

Thus the New York Court of Appeals considered itself precluded by constitutional and federal command from extending the application of the doctrine of "divisible divorce" as a matter of local state policy, to any situation involving a foreign divorce decree predicated upon personal jurisdiction of both spouses. The very contrary is indicated by this Court in *Coe* v. *Coe, supra.*

In the *Coe* case personal jurisdiction existed over both parties in Nevada where divorce proceedings were brought by the husband. After returning to Massachusetts, the actual State of residence of the parties, the wife sought to enforce the provisions of a Massachusetts separate maintenance decree theretofore granted to her, notwithstanding that the Nevada divorce decree entered in her favor on her cross complaint, incorporated an agreement providing for weekly installments of alimony in addition to a lump sum payment. Even in these compelling circumstances this Court specifically pointed out:

> "There is no suggestion in the opinion of the Supreme Judicial Court that petitioner [husband], under *state* law, could be held to the obligations imposed by the decree for separate support if it be conceded that the Nevada decree of divorce is valid."[13] (p. 383; emphasis supplied)

The footnote reference significantly enough is as follows:

> "[13] See *Rosa* v. *Rosa,* 296 Mass. 271, 5 N. E. 2d 417 (1936); *Cohen* v. *Cohen,* 319 Mass. 31, 64 N. E. 2d 689

(1946). Cf. *Estin* v. *Estin, post,* p. 541; *Kreiger* v. *Kreiger, post,* p. 555." (p. 383)

Thus this Court plainly indicated that notwithstanding personal jurisdiction in Nevada, the Massachusetts Court would have been in a position to grant the wife relief had the "divisible divorce" doctrine been established as matter of state law.

Moreover in the instant case, we have the controlling consideration, as pointed out in the opinion at the Appellate Division that, "although the Nevada court in this case had personal jurisdiction over both parties, it was not required to exercise that jurisdiction with respect to both the marital status and the husband's obligation to support. In fact, in this case, as appears from the statement of facts, the Nevada court expressly refrained from doing so" (R. 148). The prevailing opinion then added, "that is not only our interpretation of what was done in the Nevada action, that is the way the parties construed it in practical application. The husband himself for many years recognized this, because he not only continued to comply with the New York alimony provision but he took advantage of the provision for alimony in the New York judgment to make deductions therefor from his income tax" (R. 148).

The full faith and credit clause did not "compel" forfeiture of support to Mrs. Lynn solely because she appeared in Nevada to defend her marital status, *where the Nevada Court refused to treat with the issue of support* (R. 15, 16). To deny application of the "divisible divorce" doctrine, where the divorce decree (as the New York Court of Appeals recognized [R. 164]) contained no conflicting or incongruous support provisions, with resultant deprivation of all support to the wife, visits a penalty upon the wife for defending her marital status, which we submit, was in no

wise "compelled" by any of the recent decisions of this Court.

The Nevada Court had no jurisdiction to grant a decree of divorce which denied full faith and credit to the wife's New York judgment.

In *Estin* v. *Estin, supra,* this Court stated that, "since Nevada had no jurisdiction to alter respondent's rights in the New York judgment, we do not reach the further question whether in any event that judgment would be entitled to full faith and credit in Nevada" (p. 549).

As the Appellate Division pointed out in this case, "it is obvious that the Nevada decree which is before us and the contents of which have been quoted above failed on its face to give full faith and credit to the New York decree of permanent separation theretofore granted to Mrs. Lynn" (R. 151-152). The marital relationship between the parties (albeit not the marital status) had been terminated "forever" by plaintiff's New York separate maintenance decree (R. 42). Under New York law, as the Appellate Division pointed out, "thereafter Mrs. Lynn owed her husband no further duties except that of chastity" (R. 152).

The husband sought a divorce on the ground of alleged extreme cruelty "during the married life of the parties" (R. 27, 29). He specifically asserted "that the acts and things alleged in plaintiff's [husband] complaint and bill of particulars occurring since the 22nd day of January, 1942 [wife's New York decree] are a continuance of a series of acts of extreme cruelty inflicted prior to that date and are directly associated with them" (R. 64). The Nevada court *improperly split* (R. 142) the husband's cause of action (See *Henderson* v. *Henderson,* 1 Hare 115, quoted in *Beloit* v. *Morgan,* 7 Wall. 619), and granted a divorce based

upon alleged acts "occurring after" the date of the wife's New York decree (R. 53). There was no amendment of the pleadings apprising the wife that she would be confronted with any such issue.

Plaintiff's New York decree adjudged that the husband and not the wife was at fault and hence precluded the subsequent granting of a divorce in favor of the husband upon the ground of extreme cruelty (*Harding* v. *Harding,* 198 U.S. 316, 338, 339; *Barber* v. *Barber,* 21 How. 582, 588, 16 L. ed. 226, 228). These cases hold that no divorce decree can be granted to a husband for alleged misconduct of the wife, where, in a prior separate maintenance suit, he had been adjudged the wrongdoer (R. 151).

The New York Court of Appeals ruled, however that "even if we were to accept the view of the Appellate Division that the Nevada Court, in decreeing the divorce, failed to give appropriate effect to the adjudication made in the New York action, the court of this state would still be required to accord full faith and credit to the Nevada decree," holding that Nevada's asserted disregard of the Constitutional requirement of the full faith and credit clause "does not justify or permit retaliation by any other state" (R. 163).

No problem of retaliation is here presented. The wife, in applying for an increase in the alimony occasioned by augmented needs due to illness and other causes (R. 8) was not asking the New York courts to retaliate against Nevada for its disregard of her New York judgment. She was simply seeking in her original action, continuance of the protection afforded by her New York decree, at least in its maintenance provisions, which the Nevada Court had expressly refused to alter, and the continued existence of which the husband for many years after divorce, had recog-

nized, and under which he himself had taken substantial tax advantages.

Plaintiff's New York decree provided for modification of the financial provisions "upon a showing of changed circumstances" (R. 164, 47). Under that decree, the New York courts had continuous personal jurisdiction over both spouses (*Fox* v. *Fox*, 263 N. Y. 68; *Weiss* v. *Weiss*, 58 N. Y. S. 2d 396, 397; *Bassett* v. *Bassett*, 141 F. 2d 954). Hence, the wife was seeking relief in the only tribunal then having jurisdiction over the parties. She could not obtain relief in Nevada because, under Rule XLV of the District Court of Nevada, there was a six months period of limitations for securing amendments or modification of judgments or orders (R. 149).

This case presents an ironic paradox. The New York Court of Appeals felt "compelled" to give a *legal effect* to the husband's Nevada divorce as to the termination of its own domiciliary's rights to support, which the *acts* of the Nevada Court and of the husband himself negated. The Court's further statement that the impoverished wife must seek redress "through the Nevada Court and, if necessary to the Supreme Court of the United States" (R. 163) is best answered by the following from the prevailing opinion at the Appellate Division:

> "Of course she could have resorted to that costly procedure. But the State of New York also has an interest of paramount importance in maintaining, within constitutional limitations, the validity and integrity of its own judgments, in matrimonial actions especially, because of the danger of the wife and children becoming public charges." (R. 153).

The federal tax advantages taken by the husband and the consequent imposition of federal taxes upon the wife in respect of the payments made under the wife's New York decree estopped the husband from challenging the validity thereof.

Had the husband stopped making alimony payments upon obtaining his Nevada divorce, the wife, as the law then stood (1943), could have relitigated the issue of domicile in New York (*Sherrer* v. *Sherrer, supra,* pp. 352, 353; *Andrews* v. *Andrews,* 188 U. S. 14). In the alternative (providing her application was made within six months thereafter) as the prevailing opinion at the Appellate Division points out, the wife "could have applied to the Nevada Court for a modification of its decree so as to make provision for her support" (R. 149; Rules of Nevada District Court, rule XLV). She did neither. That is understandable because of the fact, as the Court of Appeals itself noted, that the husband for six years after his Nevada divorce "continued to pay plaintiff [wife] the $85.00 a week called for by the earlier New York judgment and for such amounts took the benefit of tax deductions" (R. 161-162). As the Court of Appeals further indicated, "such deductions are allowed only for payments made pursuant to a decree (Internal Revenue Code, §22, subd. [k]; §23, subd. [u]; U. S. Code, tit. 26; Tax Law, §359, subd. 8; §360, subd. 17)." (R. 167.)

Since the husband was in high tax brackets (R. 7, 25), as the record demonstrates, he shifted the major part of his alimony obligations to the Government through his tax deductions (R. 13) with consequent tax burdens upon the wife (R. 13).

The Court of Appeals statement that no estoppel resulted because "plaintiff was not concluded by defendant's characterization of the payments in his tax returns" (R. 167) simply means that plaintiff was obliged to challenge the

validity of her own New York judgment and involve herself in litigation with the United States taxing authorities as to the taxability of her alimony.

Moreover the husband's tax returns, which were vital on the issue of domicile, were made available to the wife only because leave to appeal to the Court of Appeals was conditioned upon the submission of copies to her (R. 134). These returns show that the husband always regarded himself as a resident of the State of New York and filed his returns on forms limited to New York residents rather than non-residents and indicated that he was always in the employ of a New York company, although in his correspondence to his little daughter, defendant designedly gave the impression that his stay in Nevada was intended to be permanent (R. 116).

Thus pertinent facts with respect to the husband's domicile were effectively concealed for many years after the six months limitation period had expired under Rule XLV of the District Court Rules of Nevada, within which period a motion for a vacation or modification of the Nevada decree would have to be made. Indeed, we urged that the wife was thus denied "a full opportunity to contest the issue" of the husband's Nevada domicile (*Sherrer* v. *Sherrer, supra,* p. 352; see also *The Problem of Migratory Divorce, Amer. Bar Assoc. Journal,* Jan., 1951, pp. 12, 14).

In any event the undisputed facts warranted the application of the doctrine of equitable estoppel (*Dickerson* v. *Colgrove,* 100 U. S. 578, 580; *Ralston Purina Co.* v. *U. S.,* 58 Fed. 2d 1065, 1067, 1068).

Conclusion

For the foregoing reasons this petition for certiorari should be granted.

Respectfully submitted,

SAMUEL GOTTLIEB,
Counsel for Petitioner.

HAROLD I. COLE,
On the Brief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. [redacted] 40

LILLIAN LYNN,

Petitioner,

vs.

JAY J. LYNN,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT IN OPPOSITION

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OTHER AUTHORITIES CITED

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Special Term of the New York State Supreme Court (R. 118-128) is reported in 192 Misc. 720. The prevailing and dissenting opinions of the Appellate Division (R. 138-158) are reported in 275 App. Div. 269. The opinion of the Court of Appeals (R. 161-168) is reported in 302 N. Y. 193.

Jurisdiction

The jurisdictional requisites are set forth in the petition.

Question Presented

There is only one substantial federal question raised in this case:

> Has the New York Court of Appeals exceeded its duty under the Full Faith and Credit Clause by holding that a valid Nevada divorce decree, granted upon the personal appearance and active participation of both parties, terminated the support provisions of a prior separate maintenance order, when that is the effect the divorce has in both the States of Nevada and New York?

Implicit therein is the question "whether the doctrine of 'divisible divorce' heretofore enunciated and applied in cases where the out-of-state divorce decree was granted to the husband *ex parte* [*Estin* v. *Estin,* 334 U. S. 541] is to be extended to cover situations where the wife appeared in the divorce proceeding" (R. 161) and had full opportunity to litigate the question of support. The Court of Appeals held that where both parties are properly before the court, it is appropriate to apply the effect of the divorce decree both to the marital status and to property relationships.

Statement of Facts

The parties were married in 1926. They had one child, Janet Louise who became of age in 1948 (R. 24); her rights are not involved in this action (R. 162).

On January 22, 1942, the petitioner-wife secured a decree of separate maintenance from the respondent-husband in the Supreme Court of New York County on the ground of abandonment (R. 35-44). The separation judgment awarded petitioner custody of the child (R. 42) and alimony in the sum of $85 per week (R. 47).

Subsequently respondent moved his residence to Nevada (R. 22) and in April of 1943 filed a suit, pursuant to the laws of that State, for absolute divorce on the ground of cruelty committed by petitioner at various times, and specifically in the period *subsequent* to the date of the separation decree (R. 27-29).

Petitioner made a timely general appearance through a Nevada attorney. Having chosen to contest the suit, she had full opportunity to litigate all the relevant issues in the divorce action and she took full advantage of her opportunity. She contested the action with resolution and tenacity (R. 23). Her attorney demurred to the complaint on the grounds that it did not state facts sufficient to constitute a cause of action (R. 55-56), and made a demand for bill of particulars (R. 57-58). Petitioner's answer in the Nevada divorce action put into issue every essential allegation of the complaint, including the husband's *bona fide* residence in Nevada (R. 27-28, 31) and cruelty committed *subsequent* to the date of the separation decree (R. 31). The answer also incorporated the findings of fact, conclusions of law and the judgment in the New York separation action as an affirmative defense of *res judicata* on the issue of cruelty occurring *prior* to the date of that action (R. 35-48).

Petitioner was present throughout the three-day trial; she took the stand personally and testified in her own behalf (R. 23).

The Nevada Court, on all the evidence, granted the husband a decree of divorce, without provision for alimony, upon findings of fact that: (1) the husband had been for the jurisdictional period a *bona fide* resident of Nevada (R. 50), (2) that the wife *subsequent* to the date of the New York separation decree practised "a course of extreme cruelty" against the husband (R. 51); and (3) that the wife affirmatively and formally insisted that she was deliberately refraining from making any claim for alimony or support (R. 51). No contention is made that any act of the respondent contributed to the position taken by her in this regard.

From the judgment of the Nevada Court, the petitioner-wife never appealed (R. 23).

The respondent, after the divorce, continued to make payments of $85 per week to petitioner, in whose custody the child remained. Affidavits submitted on petitioner's own behalf freely stated that respondent, after the divorce decree, had clearly advised her, and she was therefore aware, that these payments were "voluntary and gratuitous" (R. 20).

Janet came of age on June 30, 1948 (R. 24). On June 11, 1948 petitioner in the New York County Supreme Court moved for an order to amend the prior judgment in the New York separation action to increase her alimony from $85 to $200 per week (R. 4-5). Respondent opposed on the ground of the *res judicata* effect of the Nevada divorce (R. 23-24).

The New York Supreme Court at Special Term denied the wife's application, holding that the valid Nevada divorce terminated the husband's obligation to pay alimony under the prior separation judgment (R. 118-128). The Appellate Division reversed by a sharply divided court, three justices concurring in a majority opinion (R. 138-153), and two justices joining in a dissenting opinion (R. 154-158).

The Court of Appeals unanimously reversed the Appellate Division and affirmed the Special Term (R. 161-168). It held that: (1) the personal appearance of the wife gave the Nevada Court jurisdiction not only over the marital status of the parties but also over the property rights inherent in that status and consequently made inapplicable the divisible divorce doctrine enunciated in *Estin* v. *Estin*, 334 U. S. 541; (2) under Nevada law a divorce overrides a prior support order and the Full Faith and Credit Clause requires New York to give to the divorce a like effect;* (3) this is so whether or not the issue

* It would also appear to be implicit in its decision that under New York law a divorce overrides a prior support order and hence that the Full Faith and Credit Clause requires New York to give no lesser effect to the valid decree of a Nevada court having full jurisdiction of both parties.

of alimony was raised or litigated in the divorce action; (4) assuming arguendo that the Nevada Court failed to give appropriate effect to the New York separation judgment, it is not proper for the New York Courts to retaliate by refusing to give full faith and credit to the Nevada divorce; (5) if the Nevada Court so erred, petitioner's proper remedy lay through appeal in Nevada; (6) the husband was not estopped in this action from asserting the *res judicata* effect of the Nevada decree.

ARGUMENT

I

The Full Faith and Credit Clause requires the New York courts to give to a valid Nevada divorce decree, granted on appearance of both parties, the effect of superseding the support provisions of a prior separation decree.

The enabling statute (Act of May 26, 1790, c. 11 as amended R. S. § 905, 28 USC § 1738) of the Full Faith and Credit Clause of the United States Constitution (Article IV, Section 1) provides that judgments shall have the same force and effect "in every court within the United States as they have by law or usage or the court of the state from which they are taken."

This court has interpreted that Clause as follows in *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430 (p. 439):

> "The constitutional command requires that a state enforce a judgment of a sister state * * * although the suit in which the judgment was obtained could not have been maintained under the laws and policy of the forum to which the judgment is brought. * * *
>
> "These consequences flow from the clear purpose of the full faith and credit clause to establish throughout the federal system the salutary principle of the

> common law that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in a judgment in one state is likewise merged in every other."

To the same effect are:

> *Johnson* v. *Muelberger,* 340 U. S. 581, 584;
> *Williams* v. *North Carolina,* 325 U. S. 226, 228;
> *Fauntleroy* v. *Lum,* 210 U. S. 230.

Under Nevada law a valid divorce terminates the support provisions of a prior separation decree.

> "The dissolution of the marriage relationship extinguishes the subject matter which forms the basis of an action or proceeding for separate maintenance. (*Herrick* v. *Herrick,* 55 Nev. 59, 68, 25 P. (2nd) 378, 380, cited with approval in *Estin* v. *Estin,* 334 U. S. 541, 547.)

To the same effect as to Nevada law on the point, see:

> *Durlacher* v. *Durlacher,* 123 F. (2d) 70 (Cir. 9th), cert. denied 315 U. S. 805;
> *Lagemann* v. *Lagemann,* 65 Nev. 373, rehearing denied 65 Nev. 385, appeal dismissed 336 U. S. 932.

The above cases indicate that a divorce has this effect in Nevada even though alimony or support was not claimed by the wife and the issue was not litigated or passed upon by the court. This follows from the fact that the right of a wife to support from her husband is one of the most important "incidents" of the marriage (*Yarborough* v. *Yarborough,* 290 U. S. 202, 210, 212) and is necessarily involved in a divorce action designed to dissolve that relationship. In this regard Nevada law follows the prevailing common law of the land:

Bloedorn v. *Bloedorn,* 76 Fed. (2d) 812 (D. C. Cir.) cert. denied 295 U. S. 746;
Holmes v. *Holmes,* 155 Fed. (2d) 737, 739 (D. C. Cir.);
Kamp v. *Kamp,* 59 N. Y. 212;
Jones v. *Jones,* 249 Ala. 386;
Rosa v. *Rosa,* 296 Mass. 271;
Weidman v. *Weidman,* 57 Ohio St. 101.

See also:

1 A. L. R. 2d 1937.
27 Am. Jur. 1950 Supp. p. 5;
2 Freedman on Judgments (5th ed.); § 911 pp. 1915, 1916;

It follows that the New York Court, pursuant to the "command" of the Constitution to give "full, not partial credit" (*Halvey* v. *Halvey,* 330 U. S. 610, 614) to the Nevada judgment, must hold that the Nevada divorce terminated the support obligations of the husband under the prior separate maintenance decree.

The same result is reached if the Full Faith and Credit Clause be interpreted to require New York to give to the Nevada divorce the same effect as it gives to a decree of its own, with similar jurisdictional foundations (*Estin* v. *Estin,* 334 U. S. 54, 552, 554); for as a matter of New York State law a domestic divorce granted on the appearance of both parties obliterates a prior support order. (*Burton* v. *Burton,* 150 App. Div. 790 (2d Dept.); see *Estin* v. *Estin,* 296 N. Y. 308, and cases cited at pp. 312, 313.)

Moreover, New York could not constitutionally evade its obligations under the Full Faith and Credit Clause on the ground of a local interest in preventing *former* wives from becoming public charges. Assuming this to be the public policy of New York, the Full Faith and Credit Clause nevertheless requires New York to hold that the valid Nevada divorce superseded the alimony provisions

of the separation judgment; for a State is required to enforce even "hostile policies reflected in the judgments of another State" (*Estin* v. *Estin,* 334 U. S. 541, 546) as "part of the price of the federal system." (*Williams* v. *North Carolina,* 317 U. S. 287, 302; *Sherrer* v. *Sherrer,* 334 U. S. 343, 354, 355; *Johnson* v. *Muelberger,* 340 U. S. 581, 584.)

However, New York has no public policy to prevent the impoverishment of a *former* wife *after* she has appeared in a domestic action. The wife is required to assert her claim for future support *at the time of the dissolution of her marriage.* If she fails to apply at that time, whether in a foreign or domestic divorce, she cannot subsequently obtain alimony from her ex-spouse, even if she has later become destitute and he extremely wealthy. (*Glaser* v. *Glaser,* 276 N. Y. 296; *Pearson* v. *Pearson,* 230 N. Y. 141.) The wife is bound by her own handling of the case, and her failure to assert defenses or claims she could have litigated cannot be the "basis for subsequent attack in the courts of a sister state on a decree valid in the state in which it was rendered." (*Sherrer* v. *Sherrer,* 334 U. S. 343, 352.)

Incidentally, it may be noted that there is no evidence that the wife was at any time, or is now, in any danger of becoming a public charge.

II

The decision below preserves the divisible divorce doctrine within sound limits.

In *Estin* v. *Estin,* 334 U. S. 541 this court held that a Nevada *ex parte* divorce was entitled to recognition in New York in so far as it dissolved the marital status of the parties, but that since Nevada lacked personal jurisdiction over the wife, New York was not required by the Full Faith and Credit Clause to give to the divorce the effect of terminating the wife's property rights under a prior separation decree.

The controlling fact in that case was the absence of personal jurisdiction over the wife: (p. 549)

> "Since Nevada had no *power* to adjudiciate respondent's rights in the New York judgment, New York need not give Full Faith and Credit to that phase of the Nevada's judgment. (Italics of the Court.)

To the same effect is *Krieger* v. *Krieger,* 334 U. S. 555 at page 557.

Although the petitioner herein personally appeared in the Nevada divorce action and had full opportunity to litigate the matter of support, she nevertheless contends that the Court of Appeals erred in refusing to apply the doctrine of divisible divorce. Petitioner, in effect, argues that the *Estin* case completely destroyed, in every case, the principle that the incidents of the marriage end with a divorce; and that in its place it established the doctrine that marital status can be dissolved without affecting a wife's right to support, regardless of full participation by the wife in the divorce proceedings.

The *Estin* case, of course, has no such meaning. That case does not annul the well established basic principle that runs through the entire law of domestic relations that a divorce terminates the incidents of the marriage. It merely correlates incidents of marriage with their respective appropriate jurisdictional prerequisites; and allocates to those incidents of marriage that affect property rights, such as alimony, the appropriate requirement of personal jurisdiction.

The divisibility principle has a great usefulness and serves a great need when properly employed. However, to extend the doctrine to cases where the wife appeared and had full opportunity to litigate the matter of support would not only ignore the origin of the rule and distort its meaning, but would lead to highly undesirable results. It would mean that a divorce rather than being the *end* of litigation between husband and wife would be only

the *beginning* of litigation. It would mean that a former wife by merely remaining silent in the divorce action, could, on separate occasions, perhaps stretching over many years, litigate independently each of the incidents of marriage: e.g., (1) her right to alimony and support; (2) her right to dower or to elect under her former husband's will; (3) her right of survivorship in property held by herself and her former husband as tenants by the entirety; (4) the custody of the children; and possibly in this complex area of law, rights not presently forseeable.

It is thus apparent that the doctrine of divisible divorce, as enunciated in *Estin* v. *Estin*, should be limited to *ex parte* divorces. To remove that limitation would make it a "mad-dog" doctrine that would not only upset established precedents and create anarchy in the law of domestic relations, but it would leave the doctrine of divisible divorce without support in policy or logic and thus ultimately destroy the doctrine itself.

* * * * * *

Petitioner's contention that the Nevada Court had no "jurisdiction" to grant a decree of divorce because it purportedly failed to give appropriate effect to the New York separation judgment is wholly without merit. The New York Separation Decree, dated January 22, 1942, was based upon events prior thereto. The Nevada Court clearly indicated that it based its decree on occurrences subsequent to January 22, 1942 (R. 51). In effect, petitioner contends that a New York decree contains some magical attribute which makes it immutable and changeless forever. The Nevada Court gave it its full effect by declining to consider or give effect to any acts occurring prior thereto. New York could not by decree preempt exclusive jurisdiction over the parties perpetually thereafter regardless of subsequent events. So Nevada held, and so the New York Court of Appeals has held.

Furthermore, as the Court of Appeals correctly said, if the Nevada Court of original jurisdiction made such an error, remedy lay through appeal in Nevada; and in any

event, New York could not retaliate by refusing to give full faith and credit to the Nevada decree (R. 163).

Petitioner's argument that the husband was estopped to assert the res judicata effect of the divorce is aptly disposed of by the Court of Appeals at pages 166 and 167 of the Record. It might be added that estoppel is a matter of State law and does not raise a federal question. (28 U. S. C. §§ 1331, 1257; Cyclopedia of Federal Procedure, (2nd Edition), Vol. 1 §§ 170, 181, Vol. 10, Sec. 4779.)

CONCLUSION

The decision below is clearly correct on the law. It is consistent with the authoritative holdings of this court. It is pragmatically sound in refusing to extend the doctrine of divisible divorce to cases in which the court had full jurisdiction of both parties and the wife had the opportunity to litigate all the incidences of the marriage.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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